

STUDENT THESIS

The Geneva Conventions
Military Medical Doctrine and Special Warfare Operations

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SUMMARY

Rules of war are essential to protect soldiers and civilians in war and, in a larger sense, to guarantee the survival of mankind and of civilization itself. The Geneva Conventions are the quintessence of these rules of international law for the protection of the victims of war. Their aims are to safeguard the respect and dignity of man and to insure his fundamental rights and well being in his controversies with his fellows.

The nations of the world, particularly the Western world, find themselves honor-bound by international treaty to comply with and to support a humanitarian document, the Geneva conventions, which was designed and formulated to ~~accommodate~~ conditions of war totally different from those which are current in the struggles of today. Strict adherence to the Conventions in this new and modern era of unconventional warfare results in loss of efficiency and of effectiveness in waging the fight, particularly when the opposing combatants do not honor its provisions. This is the dilemma which confronts many of the nations of the Free World in their battle to halt the advances of the Communist ideology.

This study has attempted to delineate this dilemma by; first, discussing the philosophy, development, and general provisions of the Geneva Conventions in the context of the conventional war for which they were designed; second, by describing the theory and

technique of special warfare operations and how they differ from the warfare operations of the eighteen and first part of the nineteen hundreds; and third, by contrasting the philosophy and selected provisions of the Conventions with the actual conditions existent in special warfare operations. An effort was made to point out the lack of congruity and realism in the relationship of these provisions and the tactics of guerrilla and counter-guerrilla warfare.

The conclusion of the study is simple in that it merely suggests that the Conventions, as now constituted, are inadequate to fulfill their intended function in terms of the special warfare operations of today. It is further suggested that the complex nature of man, his unstable political civilization, and the vulgarities of his modern wars may make the formulation of a realistic and workable code of humane treatment for war victims very difficult, if not impossible. This is not to imply that the rules of humane conduct in modern war are passe' or that man should resign himself to the fatalistic pessimism of the inevitability of cruel and inhumane war. It does mean, however, that only by a determined, intensive, and sincere effort on the part of the entire community of nations will this dilemma be resolved.

CHAPTER I

INTRODUCTION

LETTER OF MAJOR GENERAL H. W. HALLECK TO FRANCIS LIEBER

Headquarters of the Army
Washington, Aug 6, 1862

Dr. Francis Lieber, New York

My dear Doctor: Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war, I hope that you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies, they will retaliate by executing our prisoners of war in their possession.

I particularly request your views on these questions.

Very respectfully,

Your obedient servant,

H. W. Halleck

General-in-Chief U.S.A.¹

¹Francis Lieber, Guerrilla Parties Considered with Reference to the Laws of War, p. 1.

Dr. Francis Lieber, an acknowledged and internationally accepted authority of the day on the usages and customs of war, in answer to General Halleck's letter prepared, under President Lincoln's direction, a pamphlet entitled Guerrilla Parties Considered with Reference to the Laws and Usages of War.² Lieber's work was a major contribution to international legal philosophy regarding war and its inhumanities, and it was the basis for the first comprehensive codification of the laws of war. This codification was issued by the War Department of the United States in 1863 as General Order No. 100, Instructions for the Government of the Armies of the United States in the Field.³ Professor Lieber, in

²Francis Lieber was born in Berlin, Germany on 18 March 1800. At the age of fifteen, during the Hundred Days, he enlisted in the Colbey Regiment and fought under Blucher at Waterloo. Later at the battle of Namur he was wounded and left for dead on the battlefield. He obtained his doctorate in law at the Univ. of Jena in 1820. He came to the US as a political refugee in 1827. After a distinguished academic career which culminated in the professorship of International Law at Columbia University, he died in 1872. It is interesting to note that he had three sons, one of whom fought for the Union. One of his sons, Brig Gen Guido Lieber, later served the United States as the Judge Advocate General. See generally, DA Pamphlet 27-100-21, Military Law Review, 1963, pp. 157-162.

³US War Dept. General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field, Washington, War Dept., Adjutant General's Office, April 24, 1863.

essence, advocated the humane treatment of all types of irregulars except spies and bandits. His thesis that "modern war must have humane belligerents" is one of the working concepts generally accepted today by most civilized peoples in their quest for reduction of the inhumanities of armed conflict.⁴

Today, however, over one hundred years since the pioneer work of Dr. Lieber and in spite of a tremendous amount of humanitarian and legal thought, writing, and action since Lieber's time, these same baffling questions concerning guerrillas and the many facets of their activities are largely unsolved and are still cogent factors in current local and international struggle and evolution.

SOME ASPECTS OF UNITED STATES AND SOVIET MILITARY POSTURE

National defense plans and policies are based, in part at least, upon the capabilities of a possible enemy and, to a much lesser degree, upon estimates of his intentions. As the nature and degree of the threat change, modification in national strategy, plans, and policies become necessary in order to meet these new conditions. The late President Kennedy, soon after his inauguration in 1961, recognized that some facets of the nature of the threat to the national security of the United States had

⁴Lieber, op. cit., pp. 2-10.

changed and that modification of the emphasis and direction of defense policies was needed to counter this change.⁵ This change away from the concept of "massive retaliation" as the basic and only defense policy of the United States was due in large part to the "nuclear stalemate" and to the increasing successes of the Communist in subverting and attacking from within unstable or newly emerging governments. Communist activities and successes in Cuba, Latin America, Asia, and Africa were and still are particularly disturbing. While insurgency has long been a Communist tactic in subverting and overthrowing unstable and unfriendly governments, Chairman Khrushchev gave it renewed viability in his now famous speech of 6 January 1961 to the Institute of Marxian-Leninism of the Central Committee of the Communist Party of the Soviet Union in Moscow. In this speech he declared that there would be no diminution of the effort by the Soviets and her allies to achieve worldwide communism. He further stated that world wars and nuclear wars as instruments of Soviet foreign policy were too destructive to be of any value and that conventional wars and local or limited wars were to be avoided because of the very great danger of escalation into a nuclear holocaust. After repeatedly and forcefully emphasizing the Soviet determination to prevent and defeat such wars of destruction and aggression, Mr. Khrushchev had this to say:

⁵President John F. Kennedy, Message to Congress, 1961.

Now a word about national liberation wars. Liberation wars will continue to exist as long as imperialism exists, as long as colonialism exists. These are revolutionary wars. Such wars are not only admissible but inevitable, since colonialists do not grant independence voluntarily. . . . We recognize such wars, we help and will help in the future all peoples striving for their independence. Can such wars flare up in the future? They can. What is the attitude of the Marxist toward such uprisings? A most positive one. The communist fully support such just wars and march in the front rank with the peoples waging such liberation struggles.⁶

This doctrine was repeated and re-emphasized in an informative treatise entitled Soviet Military Strategy which was edited by Marshall of the Soviet Union, V. D. Sokolovskii.⁷ Here are set forth the current general concepts of Soviet military doctrine and strategy, including the role of unconventional warfare as a Soviet means of supporting the "just" or "peoples" wars.

In order to achieve their goal of world domination, the Soviets have carefully, methodically, and skillfully developed a combined weapons system composed of political, social, economic, and military elements, and it has proven to be tremendously effective. By integrating elements of conventional armed might with a variety of unconventional tactical tools, such as guerrilla movements, espionage, worldwide propaganda campaigns, subversion, terror, and political, social, and economic warfare techniques, the Soviets have, in the past two decades, succeeded

⁶ N. K. Khrushchev, Address to Higher Party School, Academy of Social Sciences, Institute of Marxian-Leninism of the Central Committee, Communist Party of the Soviet Union, 6 Jan 1961.

⁷ V. D. Sokolovskii, Soviet Military Strategy, p. 48.

in maintaining the initiative and in keeping the West off balance in responding to their almost constant game of thrust and parry. At the same time they have succeeded in extending their domination and ideological concepts over a considable portion of the earth's surface.

In recognition of the necessity for changing our military concepts and doctrines, the late President Kennedy stated that it was essential to have a choice of alternatives in dealing with critical and potentially explosive problems. As a result, a "strategy of flexible response" so aptly described by General Maxwell D. Taylor in his book, The Uncertain Trumpet, was developed and integrated into the national defense posture.⁸

General Taylor, in commenting on this strategy as opposed to that of massive retaliation, said:

In the approaching era of atomic plenty, with resulting mutual deterrence, the Communists will probably be inclined to expand their tactics of subversion and limited aggression. The National Military Program therefore must provide for the deterrence of limited aggression and for the defeat of such aggression if deterrent measures fail.

In accordance with this concept, the President in his budget message to the Congress in March 1962, in which he discussed his defense policies, asked for monies to develop and expand the special forces strategic capabilities. He rather dramatically signaled this shift in direction of US military thinking and the

⁸ Maxwell D. Taylor, The Uncertain Trumpet, pp. 4-6.

importance he attached to it in an address to the 1962 graduating class of the United States Military Academy at West Point, when he said in part:

This is another type of warfare, new in its intensity, ancient in its origins--war by guerrillas, subversives, insurgents, assassins--war by ambush instead of by combat, by infiltration instead of aggression--seeking victory by eroding and exhausting the enemy instead of engaging him. It requires in those situations where we must encounter it--and these are the kinds of challenges that will befall us in the next decade if freedom is to be saved--a whole new kind of strategy, a wholly different kind of force and therefore a new and wholly different kind of military training.

The United States government now deals with special forces operations as a major element of national military policy and these forces are given a high priority by all agencies of the Government that are concerned with their development. The ever present and overriding threat of total destruction in a nuclear war and the tried but unsatisfactory limited conventional warfare as a means of insuring the national security and of achieving national goals and ambitions suggest that Special Forces Warfare may be the only method of warfare capable of being operated by man without destroying himself and his world of today.

THE JUDEO-CHRISTIAN ETHIC

The Judeo-Christian ethic of the United States has from the very beginnings of its history dictated just and humanitarian

⁹ Extract of a speech by President Kennedy at West Point Graduation, 5 June 1962.

actions in war. In general, however, the wars in which the United States has been engaged have been against, with the exception of the Indian, Japanese, and Korean wars, societies and governments with somewhat similar racial, cultural, religious, and moral values, and there has been, in general, a sort of quasi understanding and mutual acceptance of the necessity for and respect of humanitarian principles in war. This is not to imply, however, that the Conventions have been completely effective in the humanitarian cause, for they have not. In World War 1 and in World War 2, for example, there was gross and flagrant disregard and noncompliance with many of its provisions by both sides.¹⁰ This, of course, constitutes no basic criticism of the Geneva Conventions, but rather it is a moral indictment against those whom it was designed to protect. It is remarkable, however, that in the case of the exceptions noted above there was probably more cruelty, atrocity, and inhumanity than in any of the other wars in the nation's history. How such humanitarian principles will operate in the kaleidoscopic and polyglot battlegrounds of the nations of the world today is a moot question. Particularly, is this true in Africa and in Asia, where the Christian ethic is weak to absent and where there are vast differences in racial, cultural, educational, economic, and religious backgrounds. Although many

¹⁰Nurick and Barrett, "Legality of Guerrilla Forces Under the Laws of War," The American Journal of International Law, Vol. 40, July 1946, pp. 579-582.

of the humanitarian provisions of the Geneva Conventions of 1949 are applicable to conditions of civil or colonial war, even without the formality of recognizing a state of belligerency, the basic clandestine nature of special warfare tends to inhibit the participants from complying with regulations or Conventions which may be alien to their heritage and culture and which seemingly are not to their advantage. The moral law, as a force in dictating compliance with the Conventions in Western culture, is frequently not a factor with peoples of other cultures. Can the Conventions operate effectively in an environment where the majority of the combatants are illiterate, not of the Christian ethic, and are susceptible to a continuing and vicious anti-Western propaganda of hate and revenge is a question that only time and history, some decades hence, will be able to answer. Meanwhile, it is the moral obligation and duty of the peoples of all nations and states to strive in every way possible to ensure that this question will be answered in the affirmative.

CHAPTER II

SPECIAL WARFARE

BACKGROUND AND HISTORY

With the onset of the "nuclear stalemate" and the unprecedented flowering of many opportune areas, e.g., the politically unstable nations and the newly emerging nations, for Communist aggression and exploitation, the world has been presented with and confronted by changing concepts of conquest. This evolution in the techniques of aggression and counteraggression has found expression in the term, "Special Warfare."

Special warfare comprises all of those types of warfare alien to conventional warfare in the particular time reference period. It is usually employed against an enemy for the purpose of minimizing the relative advantages of numerical superiority, economic power, environment, equipment, or technology of weaponry. It is as old as war itself and has been employed in many ways through the ages, e.g., an internal rebellion against the established government; an overt or covert aid to friendly forces engaged in a struggle with a potential enemy; a subversive alien element in attempting to develop open rebellion in another nation, an adjunct to the native conventional forces engaged in conflict with the enemy; and the best means of fighting the superior forces of the enemy after defeat of the

regular armed forces.¹ In these various roles it has been identified by a number of different names such as guerrilla warfare, unconventional warfare, insurgency, unorthodox warfare, sabotage, subversion, irregular warfare, resistance, underground operations, partisan warfare, counterinsurgency, and counter or anti-guerrilla warfare. Probably one of the earliest references to this type of irregular warfare is noted in the Bible in the book of Maccabees where the partisan campaign of the Maccabees against the Syrians is described and again in the book of Judges where Gideon's use of stealth, surprise, camouflage, and deceit in routing the Midianites is told. Further reference to this type of warfare is noted in the brilliant and unorthodox use of delay, terror, and harassment by Fabius Maximus in defending Rome against the overwhelming conventional forces of Hannibal. In tribute to Fabius and his unorthodox techniques, the term "Fabian Tactics" has come into general acceptance and usage in denoting this type of warfare. In 1807, the French under Napoleon invaded the Iberian Peninsula and, after a period of initial success, were finally defeated, in large part, through the operations of small bands of irregular Spanish soldiers. The term "guerrilla warfare" came into the military vocabulary as a result of this action, since "guerrilla" is the Spanish diminutive meaning "little war."² By usage it has come to mean the irregular,

¹Joseph P. Kutger, "Irregular Warfare in Transition," Military Affairs, Vol. 24, Fall 1960, p 113

²Ibid., pp. 113-114

nonprofessional civilian soldier who accepts the challenge of the invading or occupying force either by supporting his country's professional Army or by substituting for it. The principles of irregular warfare were used by the Russians in 1812 against Napoleon's troops and again in World War II against the Germans. T.E. Lawrence in World War I demonstrated the effectiveness of these unorthodox tactics in his victories over the Turks.³ These actions provide classic examples of guerrilla activity in support of professional armies. In the United States the operations of Marion and his men at the battle of Cowpers during the American Revolutionary War and Mosby's tactics against the Union Armies during the American Civil War are illustrative of the principles of guerrilla warfare so recently reformulated by Mao Tzu-Tung and by Che Guevara for use in advancing the Communist ideology.

EXTENSION OF COMMUNISM

In the two decades since World War II, international communism has won a succession of victories in its struggle for world revolution and domination which have far surpassed the gains made in the preceding forty years of its existence. Since World War II, nearly 700 million people, about one quarter of the world's

³T.E. Lawrence, "The Arab Revolt of 1916-18" Encyclopedia Britannica, Vol. 10, pp. 950-953

population, and over one tenth of the total land area of the world have been brought under the control of the Communist ideology.⁴

METHOD OF COMMUNIST AGGRESSION

By and large the Communists have achieved their spectacular results in international aggression because they have concentrated their efforts on the seizure of power in targeted areas through internal attack upon the established governments. In this endeavor, they have employed every gambit and technique in the special warfare spectrum from psychological warfare to actual confrontation of government forces on a conventional warfare basis. These efforts are continuing with unabated fervor in such vital areas as Southeast Asia, the Middle East, Africa, and Latin America. Unless more effective measures are soon developed and employed in countering these unorthodox forces, these strategic areas may soon be lost in the Free World. Utilizing their well established world-wide subversive party apparatus and employing indigenous Communist cadres, the international Communists have exploited a wide variety of revolutionary techniques in order to achieve their goals. Their most successful operations have been realized in the so-called "wars of national liberation," in which the tactic

⁴US Dept of Army, ODCSOPS, Counter Insurgency Operations, Washington, Dec 1960, p. 1.

of revolutionary warfare or, perhaps more widely understood as guerrilla warfare is the most effective component.

GUERRILLA WARFARE

Special warfare, of which guerrilla warfare is the offensive component, is not just jungle war or mountain war or desert war, but rather it is a war that can be fought over any terrain and on any scale.⁵ Guerrilla warfare, as the instrument of today for the advancement of the Communist ideology, has been molded and perfected through trial and error in a succession of subversion actions beginning with the overthrow of the Czarist Government in 1917 and continuing up to the present time. It is usually on a small scale at first, involving hundreds or a few thousand participants and is frequently, except in the ideological sense, local or regional in character. It may or may not be waged according to the international law of land warfare or in accordance with the Geneva Conventions.⁶ The recent revolutionary actions in Cuba, Southeast Asia, and in Africa suggest strongly that international Conventions and treaties regarding the rules of war and humanitarian principles in war have not applied. These actions seem to be played by ear and rules are contrived as needed.

⁵W.H. Hessler "Guerrilla Warfare is Different," United States Naval Institute Proceedings, April 1962, pp. 36-37.

⁶Ibid., p. 36

Guerrilla warfare more often involves political ideas and socio-economic issues rather than rival nationalisms or territorial ambitions. It may be waged as an isolated effort or, on the fringes, in conjunction with a larger more conventional war. Usually it is not waged by two or more national governments in opposition, but characteristically it involves a disaffected local element in opposition to the regular forces of a national government.⁷ The most basic characteristic, however, of guerrilla warfare is its political nature.⁸ It is a warfare for political objectives, commonly revolutionary objectives. Mao Tze-Tung expressed this very aptly when he said:

Without a political goal, guerrilla warfare must fail; as it must if its political objectives do not coincide with the aspirations of the people and their sympathy cooperation and assistance cannot be gained. The essence⁹ of guerrilla warfare is thus revolutionary in nature.

Guerrilla fighters are dedicated and strongly motivated soldiers who fight with a deep sense of anger and social injustice. They frequently are illiterate or poorly educated and in general stem from the poorer or economically depressed class of people. In combat they are highly mobile and lightly armed and equipped. They live, for the most part, off the land and, to a degree, are somewhat independent of outside sources of supply.

⁷ Ibid., p. 37.

⁸ Douglas Stewart, "How to Fight Guerrillas," United States Naval Institute Proceedings, Vol. 88, July 1962, pp. 24-25.

⁹ Mao Tze-Tung, Yu Chi Chan, Newport: US Naval War College, 1950. (Translation by Brig Gen S. B. Griffith) p. 2.

Their operations are conducted swiftly and silently, frequently at night, within enemy territory and oft times in his near areas. Emphasis is placed on rapid lightening blows of harassment and severance of supply lines.¹⁰ Show down or decisive actions against the enemy strength are avoided unless the guerrilla position, strength, and fire power is overwhelmingly superior and there is no chance of defeat. Terror, intimidation, torture, kidnapping, and selective assassination are major tools in this type of warfare. A continuing and vital goal for the guerrilla is to win over the civil population and toward this end many and varied forms of persuasion are employed.¹¹ Frequently, an intensive propaganda campaign of hate and vilification against the government based on social and economic injustice will be coupled with selective assassination of outstanding local government representatives, especially the village chiefs, the school teachers, and the physicians. This is employed especially frequently, in Southeast Asia. At other times the guerrilla will play the part of "Robin Hood" to the people in aiding the down trodden and oppressed at the expense of those better off. On other occasions he will threaten, intimidate, kidnap, and torture in order to gain his objectives of civil cooperation and support.

¹⁰ Stewart, op. cit., pp. 24-28.

¹¹ General Giap, People's War, People's Army, USGPO, 1962, p. 56 et passim.

COUNTERGUERRILLA WARFARE

The basic principle of counter guerrilla military operations is to maintain the offensive and thereby deny the guerrillas the initiative.¹² The ineffectiveness of using conventional military tactics, techniques, and formations in combating guerrilla warfare has been well demonstrated by the Germans, the Italians, and the Japanese in World War II. Since the last great war, the Dutch, the Greeks, the British, and the French have had tremendous difficulties in combating guerrilla actions for the same reasons. On the other hand, experience in the Philippines, in Malaya, and in Africa in the past several years has shown quite conclusively that determined and timely use of psychological warfare, socio-economic actions, and bold and imaginative counter guerrilla techniques can successfully defend against almost any type of unconventional warfare. The successful counter guerrilla operation will, in general, employ the same tactics as the guerrilla forces.

One of the first steps in organizing an effective counter-insurgency is to gain the support and sympathy of the local population and thus deprive the guerrilla of one of his principal bastions of action and success. This can be done by treating the people with consideration and understanding and by providing them with security, food, clothing, and political goals which they can

¹² Harold Lyon, "Counter Action," Army, Vol. 13 August 1962, p. 53.

understand and desire.¹³ These goals must challenge and counter the political, social, and economic opportunities presented in the propaganda of the guerrilla forces and communicate to the people, repeatedly and by all available media, the determination of the government to remove all injustices and the grievances which they have caused. In other words, the government must offer to the people a political, social, and economic program which surpasses that offered by the guerrillas, and which will provide an incentive for the people to actively support and defend the government against all of its enemies.

The core of the counter guerrilla military attacking forces should have superiority in numbers, fire power, communications, intelligence, and mobility. The basic principle of these forces should be to maintain the offensive and thereby deny the guerrilla the initiative. Government patrols must push vigorously into Communist dominated territory, contact the guerrillas and force them into open combat. The guerrilla forces must be kept off balance and pursued through constant offensive action to the point where fatigue, loss of supplies, and loss of safe haven or sanctuary compels him to favorably consider a bonafide offer from the government of amnesty and well being. Only the strategy of constant offensive can effectively deprive the guerrillas of the opportunity to conduct the war on terms favorable to themselves.¹⁴

¹³Hessler, op. cit., pp. 45-46.

¹⁴Franklin Lindsay, "Unconditional Warfare," Foreign Affairs, Jan 1962, pp. 266-269.

CHAPTER III

THE GENEVA CONVENTIONS

GROTIUS AND ROUSSEAU

The institution of war has developed with the history of man. Unfortunately for mankind, the development of the science and technology of war has far outstripped the evolution of social, economic, and humanitarian ideals relating to the causes and prevention of war and to the care and treatment of its victims. Prior to the time of Hugo Grotius (1583-1645), a great Dutch jurist, humanitarian, and father of international law, there was little or no socio-humanitarian custom or legal precedent for mitigating the sufferings of the victims of war. War was unbelievably harsh and cruel and captives, combatants and non-combatants were regarded as rightful booty of the victor. Slavery, torture, mutilation, and death were all too frequently the fate of these unfortunates. Grotius, stirred by the atrocities perpetrated during the Thirty Years War (1618-1648), was one of the first voices to cry out against this inhumanity and to appeal to the conscience of the world for reason, justice, and mercy in the conduct of hostilities. He was an early advocate of the principle of prisoner exchange and did much to advocate the

acceptance of this view.¹ In spite of the advanced views and pioneer work of Grotius, the question of the right of prisoners of war to survive as free men was not adequately dealt with until the latter half of the eighteenth century when Rousseau made his historic contributions. Rousseau contended that it was not a conflict between individuals in armies, but rather that it was a conflict between states or nations. His conception, and one that is now fully accepted by all nations, was that war is not a personal vindictive relationship of man to man, of combatant to combatant, but rather a conflict involving impersonal relationships between states or nations.² The aim of war being the destruction or subjugation of the enemy state, the right to kill its soldiers exists, Rousseau thought, only so long as these soldiers were armed, were in fighting condition, and could act as effective agents of their country. As soon as soldiers lay down their arms and become prisoners of war, they lost their status as instruments of the enemy state and the captor has no right, as long as they conform to their prisoner of war status, to take their lives or otherwise subject them to inhumanities. Rousseau was an early and ardent advocate of the principle that war gives no rights which are not necessary to the accomplishment of its aims.³

¹ J.V. Dillon, "The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War," Miami Law Quarterly, Vol. 5, 1950-1951, p. 43.

² Ibid., p. 45

³ Draper, G.I.A.D., The Red Cross Conventions, p. 1.

EARLY CODIFICATIONS

The views of Grotius, Rousseau, and of their contemporaries during this period had a great impact on the development of a humanitarian concept for the treatment of the victims of war and gradually the processes of acceptance and codification of these principles evolved. The Declaration of Paris in 1856, the first Geneva Convention in 1864, the Declaration of St. Petersburg in 1868, the Brussels Declaration in 1874, the Hague Conferences of 1899 and 1907, and various stipulations in bilateral treaties insuring humanitarian treatment of war victims added to a growing volume of usages, customs, and legal precedents which extended the credibility and acceptance of chivalrous ideals of conduct in war by civilized nations. Beginning in 1863 with the code of conduct formulated by Lieber and published by the United States Government as General Order No. 100 for the Army, practically all of the nations of the world have issued written guidance of a similar nature to their military establishments regarding the rules of war.

DEVELOPMENT OF THE CONVENTIONS

The Geneva Conventions, an international agreement for the purpose of ameliorating the vicious effects of war on human beings, was originally formulated and adopted by delegates of twelve European nations at an international conference held in Geneva in

1864.⁴ One of the compelling factors in the development of this conference was the publication in 1862 of a book, Un Souvenir de Solferino by Jean-Henri Dumont, a Genevese philanthropist and founder of the International Red Cross. This work was a vivid description of the horror and suffering experienced by the wounded French, Italian, and Austrian soldiers in northern Italy in 1859; particularly at the battle of Solferino, where 40,000 wounded and sick soldiers were more or less abandoned to their fate. The suffering and inhumanities sustained by these soldiers on the battlefield as a result of inadequate regulations providing for the care of the sick and wounded shocked the civilized world. Through the efforts of Dumont and his colleagues, an unofficial Congress was held in Geneva in 1863 which laid the groundwork for future international action on this problem. The Swiss Government, realizing the significance of the movement, organized an official international conference to be held in Geneva in 1864. This conference was probably the most important step forward in reducing the horrors of war since the work of Grotius and Rousseau. Similar conferences were held in 1906, in 1928, and in 1949 for the purposes of amplification, clarification, and revision of the Conventions.⁵

⁴ Ibid., p., 3.

⁵ Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949, Vol. I, pp. 9-16.

On 12 August 1949 representatives from sixty nations, after five months of effort, completed work, begun four years earlier by the International Committee of the Red Cross, on four Conventions which were designed to provide more humane standards of treatment for military and civilian victims of war.⁶ The nations of the world, with few exceptions, have accepted and ratified the Conventions and have given them the status of inviolate international treaties. In July 1955, the United States Senate gave its approval and the Conventions came into force in the United States on 2 Feb 1956.⁷

UNITED STATES COMPLIANCE WITH THE CONVENTIONS

It should be noted that, although the formal Senate ratification made the Convention treaties the law of the land only in recent years, the United States has, since its beginnings, complied with the spirit of the Conventions in its conduct of hostilities in both the conventional and the unconventional arena of conflict. It is of particular interest and significance at this time, in this era of unconventional conflict, to know that the United States upheld and implemented the ideals of the Conventions in regard to insurgency operations, when even now the expressed intent of the Conventions is not quite clear, as early as 1901. For example, during the counterinsurgency operations conducted by the United

⁶Draper, op. cit., p. 5.

⁷US Dept of the Army, Pamphlet 27-1, p. 1.

States in the Philippines in 1901, a senior American officer was court-martialed and retired from the Service for telling his troops, "I want no prisoners. The more you kill and burn, the better you will please me."⁸ President Theodore Roosevelt, in approving the findings of the court, made the following comments:

I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands and of the well nigh intolerable provocation it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes--But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and enlisted men, must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of improper character by their subordinates.⁹

It seems uncanny, but no greater prophetic or appropriate words could have been uttered, for today, sixty-three years later, they apply with equal vigor and meaning in practically the same environment and situation as they did originally.

THE CONVENTIONS

Three of the four Conventions are clarifications and revisions of earlier Conventions and international agreements dealing with the same subjects. They are:

a. The Geneva Convention for the Amelioration of the Condition of the Sick and Wounded in Armed Forces in the Field. This

⁸US Dept of the Army, Pamphlet 27-100-21, p. 106.

⁹Ibid.

Convention is based primarily upon an earlier Convention which dates back to 1864. It applies to all armed conflicts between parties to the Convention, whether war has been declared or not, and even if one of the participants refused to recognize a state of war. It also applies to partial or total occupations of the territory of a party, even if the occupation is not resisted.¹⁰

This Convention is composed of 64 separate and distinct Articles which deal with the great principle that members of the armed forces who are wounded or sick and thus harmless and defenseless, must be protected and cared for without respect to race, religious creed, sex, nationality, or political affiliation.¹¹ As a corollary, and in the exclusive interest of the wounded, it further deals with the protection of medical transport, medical supplies and equipment, medical installations, and medical personnel against hostile acts. The distinctive emblem of the Red Cross on a white background is the visible sign of this immunity. This protection, it must be noted, is predicated upon the condition that these facilities and personnel will not engage in any activity which could be injurious or hostile to the interest of the combatants. Medical personnel, for example, occupy a special status among the noncombatants and are not subject to attack by the enemy and must be respected and protected in all circumstances.

¹⁰Pictet, op. cit., pp. 27-37

¹¹Ibid., et passim.

Obviously, they are not entitled to engage in combat or other hostile activities, although they may use arms to protect themselves or the sick and wounded in their charge if they are attacked unlawfully. If they do engage in combat, except for the purposes mentioned, they lose the protection of their status; and if they engage in combat under cover of the duties which afford them protection, they may be charged with war crimes or the so-called "grave breach."

In addition to military medical personnel, the Convention accords protection on the battlefield to private activities, such as the work of voluntary relief agencies. For this reason, the International Red Cross, which symbolizes disinterested relief, has played a significant role in the operations of the Convention.

b. The Geneva Conventions for the Amelioration of the Wounded, sick, and Shipwrecked Members of the Armed Forces At Sea. This Convention is a revision of the 1907 Hague Convention No. 10. It is concerned with extending the international protection afforded land forces by the First Geneva Convention of 1949 to those members of the armed forces engaged in maritime service. This second Geneva Convention of 1949 is composed of 63 Articles, which have their counterparts in the First Convention and are enumerated in the same order. The distinctive feature of the Convention is, of course, the maritime provisions and it should be noted in this regard that the term "shipwrecked" means shipwreck from any cause and includes forced landings at sea by or from

aircraft.¹² The nature of this Convention puts it beyond the scope and interest of this study and it will not be dealt with further in this thesis.

c. The Geneva Convention Relative to the Treatment of Prisoners of War. This Convention elaborates upon and complements the provisions of the 1929 Convention, which, in turn, was based upon the Hague Conventions of 1899 and 1907.¹³

The principles of this Convention on the treatment of prisoners of war have been established along the lines that captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent prisoners of war from participation in the war. These ideals have, in fact, made the humane treatment of prisoners of war one of the chief characteristics of civilized conventional warfare and have resulted, in large part, in the elimination of the massacre, torture, enslavement, or holding to ransom which once were the lot of war captives.¹⁴ It is unfortunate that this statement cannot be made in regard to special warfare operations.

Just as with Geneva Conventions 1 and 2, 1949, this Convention also applies to all armed conflicts between parties to the Convention, whether war has been declared or not, and even if one

¹² Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949, Vol. 2, et passim.

¹³ Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949, Vol. 3, et passim.

¹⁴ Dillon, op. cit., p. 58.

of the parties refused to recognize a state of war. It also applies to all partial or total occupations of the territory of a party, even if the occupation is not resisted.

This Convention provides for a better arrangement, in logical sequence, of the Articles and eliminates many of the known ambiguities of the earlier Conventions. In addition, it more fully spells out matters which were left to the humane discretion of the signatories and establishes absolute standards of treatment, especially in regard to food, clothing, and health care for prisoners.¹⁵ This was a significant improvement, since bitter experience in past wars had shown that the rather nebulous national standard of living of the Detaining Power, that had been used as a criteria to insure adequate treatment of prisoners, was completely unsatisfactory. This was especially true in countries where food and general living conditions, as in Japan and other countries of the Orient, were radically different from Western standards. This provision would be particularly beneficial under conditions of unconventional warfare, especially in Southeast Asia, if it could be applied effectively.

Finally, in spite of the accepted philosophy that international laws and agreements deal with the conduct of nations in their relations with one another, this Convention in consonance with the trend since the cessation of hostilities of World War II

¹⁵Ibid.

and since the Nurnberg trials, seeks to identify individual misconduct, prior to and during captivity, and to extend penal sanctions for such infractions.¹⁶ These Articles are particularly concerned with prisoners of war who are guilty of war crimes and crimes against humanity.

The fourth Convention, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War is a completely new treaty. The ruthless application of the doctrine of total war by the Axis powers in World War II inflicted severe losses and suffering on the civilian populations and brought to a head the need to regulate by law the treatment of civilian populations in time of war. This need had been highlighted and recognized some years earlier when the Nurnberg International Military Tribunal and other war crime tribunals of that time punished war criminals for just such offenses as are defined in this Convention.

This new Convention is designed to minimize, to the greatest extent possible, the sufferings of civilians caught up in the backlash of war. It is the first comprehensive international agreement on the subject and is based on the cumulative experiences, customs, and rules relating to noncombatants in past conflicts.¹⁷ Civilians who fall within the scope of the Convention are offered broad protection; the intention being to

¹⁶Draper, op. cit., p. 64.

¹⁷Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949, Vol. 4, et passim.

preserve for these persons the maximum attainable safety and as many of their normal civilian rights and privileges as are consistent with a state of war. The entire Convention is based upon the general theory that "protected persons" are not participants in the conflict; rather, that they are, more often than not, its helpless victims.

This Convention applies to those same armed conflicts and conditions which have been previously noted in the other three Geneva Conventions of 1949. It protects those civilians who, "at a given moment and in any manner whatsoever" find themselves in the event of a conflict or occupation in the hands of a party to the conflict or occupying power of which they are not nationals. The following persons are not considered as protected under this Convention.¹⁸

- a. Persons protected by Geneva Conventions 1, 2, and 3, of 1949.
- b. Nationals of a state not bound by the Convention.
- c. Nationals of a neutral state who are in the territory of a belligerent, and nationals of a cobelligerent state, while their own state has normal diplomatic relations with the belligerent.

¹⁸Greenspan, Morris, The Modern Law of Land Warfare, p. 157.

ARTICLES COMMON TO THE CONVENTIONS

Articles 1, 2, and 3 are common to all four of the Conventions and are, in effect, a sort of preamble to the Conventions. These Articles are of a general character and enumerate certain fundamental principles which are common to the Conventions. These Articles are simple, straight forward, and self-explanatory and with the exception of Article 3 need no further explanation or mention. Article 1 simply states that all parties to the treaty will respect it and carry out its provisions. Article 2 deals with the application of the Conventions and defines the conditions for their application. This Article has been discussed in the previous comments on the individual Conventions.

Article 3 is of extreme significance today, because it represents a break-through in the legal concept of armed conflict not of an international character.¹⁹ The Conventions are made up of 429 individual and distinct Articles and, with the exception of Article 3, they all deal in general with armed conflicts of an international character. Article 3 embodies all of and the only provisions in the Conventions that deal directly with the type of conflicts which have plagued the world for the past two decades since the last great conventional war. In a sense it can be considered a "convention in miniature" insofar as it applies to

¹⁹ US Dept of the Army, Pamphlet 27-100-21, pp. 101-104.

noninternational conflicts, i.e., the civil wars, the police actions, the "just" wars, the "people's" wars, the wars of national liberation, etc.²⁰ Because of its tremendous significance to the entire problem of special warfare, it is reproduced here in full:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion, sex, birth, or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;

b. Taking of hostages;

c. Outrages upon personal dignity, in particular humiliating and degrading treatment;

d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Red Cross, may offer its services to the Parties of the conflict.

The parties to the conflict should endeavor to bring into force, by means of special agreements, all or part of the provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

It is, indeed, a sad commentary on the body politic of the world to realize that, in spite of voluminous and learned writings

²⁰Draper, op. cit., p. 15.

on minimizing and alleviating the ravages of war, the above quoted brief and inadequate Article represents the entire documentation existent in the world today that deals directly with the problem of the humanities and special warfare operations. A problem which has been confronting the civilized world in an acute fashion for the past two decades.

There are many other Articles which are common to the Conventions and which deal with a variety of subjects, such as penal sanctions, implementation procedures, minimum standards, dissemination of the text of the Conventions, rights of States to denounce the Conventions, etc.²¹ These Articles are mentioned here only for completeness and since they bear no special relationship to Special Warfare operations, they will not be discussed further.

IMPLEMENTATION OF THE CONVENTIONS

The Conventions are to be implemented with the cooperation and under the scrutiny of a Protecting Power or a humanitarian organization entrusted with the duties of a Protecting Power. One of the great deficiencies of the Conventions, and this is true of most any international treaty or agreement, is that there is no concrete or sure means of enforcing its provisions. The enforcement of the Conventions seems to depend upon the dignity and integrity of the signatory Powers as peace loving and civilized

²¹Ibid., p. 7.

nations in honoring an unwritten moral commitment to humanity and in honoring the provisions of an international treaty which was designed to accomplish these humanitarian goals; upon the mobilization of world opinion against those nations who violate this obligation; and upon the sanctions of international law, i.e., political, economic, or military intervention in behalf of the abused peoples.²²

In addition to the above, provision is made in the Conventions for signatory nations to enact legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any grave breaches, war crimes, or crimes against humanity involving any of the following acts, if committed against persons or property protected by the Conventions; wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, wilfully depriving a prisoner of war of the rights of fair and impartial trial, or commitment of acts hostile to the enemy by privileged and protected persons, i.e., medical personnel chaplains, etc., while in the guise of performing humanitarian duties.²³

²² Philip Thienel, The Legal Status of Participants in Unconventional Warfare, pp. 46-47.

²³ Greenspen, Morris, op. cit., p. 57.

CHAPTER IV

THE CONVENTIONS AND SPECIAL WARFARE OPERATIONS

THE COMBATANTS

The Geneva Conventions are based on practical and realistic considerations, principally from past experience, custom, and precedent, which endeavor to strike an acceptable and effective equilibrium between the harsh necessities of war and the humanitarian ideals of providing protection for its victims.¹ Since World War II, many new political, economic, and military concepts have emerged in the international arena which have disturbed this equilibrium and which have reduced the effectiveness of the Conventions in pursuing their mission of the protection of war victims. These new conditions have brought into focus the question of the adequacy of the Conventions to cope with the problems engendered by the more modern and current forms of conflict and aggression. The Conventions were primarily designed to govern more or less formal states of war or belligerency between armed forces of states or nations which conduct their hostilities in an open fashion. Kellogg, in writing on this subject, has drawn an apt analogy here to the rules of football which were designed to govern a contest between two uniformed teams, clearly distinguishable from the spectators. How well would these rules work, he

¹G.I.A.D. Draper, The Red Cross Conventions, pp. 24-25.

asks, if one team were in full uniform and on the field and the other, incompletely or not uniformed at all, hid itself among the spectators, the spectators wandering freely over the playing field.² In the same manner, in unconventional warfare the time honored distinction between combatant and noncombatant is obscured. This is so, in part at least, because of the clandestine nature of irregular warfare and because the Communist guerrilla strategy dictates that the insurgent not only use the civilian population as a means of concealment but also that he identify himself with them and use them as active participants in striking at the foe. Mao Tze-Tung put it very succinctly when, in describing guerrilla war, he stated that the guerrillas are like "fish in the sea" and that the "sea" was the people through whom the fish swam and upon whom they were nourished.³ Cuba's Che Gueverra and Viet Cong's General Giap, two highly successful revolutionary leaders, have reaffirmed Mao's doctrine and have used his principles with outstanding results in their own operations.

The philosophy of the identification of the insurgent with the people in their revolutionary struggles has found successful expression since World War II in the emergence of Communist states in Asia, Africa, and in Latin America. The eradication of the distinction between combatants and noncombatants--between the civilian and the soldier--and the flowering of the concept of the "people's war"

²US Dept of the Army, Pamphlet 27-100-21, p. 104.

³Mao Tze-Tung on Guerrilla Warfare quoted from Anthology of Related Topics on Counterinsurgency, p. 116, Vol. 1, Lackland Air Force Base.

has radically altered some of the basic precepts upon which the Geneva Conventions were conceived.⁴ These new and modern concepts of revolutionary struggle have resulted in serious confusion and doubt as to the applicability and effectiveness of the Conventions in special warfare situations.

BELLIGERENCY AND INSURGENCY

In its early stages and frequently throughout its entire course, a revolutionary movement or an insurgency is never a well ordered or smoothly scheduled operation. Because of this, it is frequently difficult to make an accurate judgment as to the status of belligerency. In general, however, when the following characteristics of an insurgency have been exhibited, it can be said that a state of war or belligerency exists. These characteristics are:⁵

1. A state of general hostility;
2. Occupation and government of a substantial part of the national territory by the insurgents;
3. Observance of the rules of warfare on the part of the revolutionary acting under a responsible authority;
4. The involvement of other states and the necessity for them to define their attitude and actions toward the insurgency.

⁴General Giap, People's War, People's Army, et passim.

⁵Pamphlet 27-100-21, op. cit., pp. 96-97.

A rather strict application of these requirements is essential in determining belligerency of a state since the legal effect of the status of belligerency is to make such hostilities international in character. The implications of this status are significant for it brings into play complex international relationships involving the customary laws of war and the Geneva Conventions. Such problems as the care of the sick and wounded, the handling of prisoners of war, the treatment of captured guerrillas, the exercise of belligerent rights at sea, the control of civilian populations, international trade, sanctuary, and the obligations of neutrality--to mention only a few--become of paramount international interest and importance.

While it is true that the Geneva Conventions can and do operate in the absence of a formal or technical state of belligerency, the basis for the implementations of its provisions under these conditions is frequently obscure and hazy. In recognition of the fact that the Conventions may be operative in the absence of a formal or technical state of war or belligerency, the framers of the 1949 Conventions substituted the phrase "Parties to the conflict" throughout the four Conventions in preference to the term "belligerents."⁶ There are, in fact, some jurists who maintain that the question of belligerency is not related to the application of the Conventions.⁷

⁶Morris Greenspan, The Modern Law of Land Warfare, p. 69.

⁷US Dept of State, Geneva Conventions of August 12, 1949 for the Protection of War Victims, p. 22.

Insurgents are usually considered to be organized bodies of men who, for public political purposes, are in a state of armed hostility against the established government.⁸ Because of the nature of their operations, they are frequently confused with and identified as bandits, outlaws, or brigands. This confusion of identity is characteristic in those states against whom the rebels are in opposition. Rebels are motivated, however, by political ambitions and the interest of the people while the bandit or brigand may commit similar acts because of a criminal desire for personal material gain. Thus, motivation and purpose, two rather intangible factors, are critical in making this judgment. This decision has important practical consequences in that if guerrillas are not accorded lawful belligerency status then their normal military acts, such as killing or wounding enemies, possession of arms and other forbidden material, and destruction of enemy property must be treated as ordinary criminal offenses. This would put special warfare operations in an entirely different perspective and could result in a generalized state of lawlessness, terror, plunder, pillage, and cruelty. The problem of international law and of the Geneva Conventions is to define and establish the rights of insurgent combatants without striking at the roots of national sovereignty and security.⁹

⁸Pamphlet 27-100-21, op. cit., p. 99.

⁹Philip Thienel, The Legal Status of Participants in Unconventional Warfare, p. 42.

The status of insurgency and belligerency in special warfare operations is confused and unclear and is subject to widely varying interpretations. For example, I. P. Trainin, a distinguished Russian Academician and Director, Institute of Law, USSR, Academy of Sciences, has written emotionally and yet somewhat convincingly that guerrillas who fight in "just" or "people's" wars are legal belligerents entitled to protection by the Conventions.¹⁰ On the other hand, he thinks that guerrillas who fight in Facist or "unjust" wars (these, in his usage, are any wars that do not advance the Communist ideology) are bandits and brigands and must bear full criminal responsibility for their acts. There are all ranges of interpretations as to the applicability of the Conventions, varying from the very liberal who believe that all guerrillas should be accorded the protection of the Conventions to the conservatives who think that the Conventions should apply only to those guerrillas who have been given bona fide belligerency status. This is particularly frustrating to those whose basic interest is humanitarianism because on this interpretation hangs the fate of those individuals who may or may not be deemed combatants with respect to the privileges and rights accorded by the Conventions. It is generally held that, in consequence of the territorial sovereignty of a state, the question of unrest, disorderliness, or local uprisings within the territory of a state is exclusively the concern of the state involved and no interference by foreign states within its boundaries is justifiable or to be tolerated.¹¹ However, if these disturbances develop

¹⁰I. P. Trainin, Questions of Guerrilla Warfare in the Law of War, et passim.

¹¹Thienel, op. cit., p. 42.

into such dimensions and intensity that their repercussions or effects are felt beyond the boundaries of the state, then international recognition of this condition indicates that a state of belligerency may exist.¹² If the condition can be further qualified by the actual existence of Civil War, the existence of a de facto political authority of the insurgents, and behavior of the forces of the insurgents in accordance with the rules of warfare and of the Conventions, then a true state of war exists. The difficulty for the Conventions comes not when all of these conditions are met, as they usually are in conventional warfare or in frank civil war, but rather in the situation where one or more of these requirements is not met. This condition is usually referred to as an insurgency and denotes a condition of political revolt or insurrection in a state which falls short of civil war. It falls short of belligerency usually because in special warfare the operations are not so widespread or destructive and there is little or no impact on the affairs of other states. The clear recognition of belligerency clothes the parties involved with all of the rights of the Conventions while the recognition of insurgency leaves the parties involved in a sort of indeterminate position with respect to the laws of war and of the Conventions; the so-called "unprivileged belligerent."¹³ Because it is in the nature of special warfare operations to encompass these rather

¹²Pamphlet 27-100-21, op. cit., pp. 98-99.

¹³Thienel, op. cit., pp. 48-49.

indefinite situations, the position of the Conventions with respect to them needs re-evaluation, clarification, and amplification to include problem areas and situations not existent at the time the Conventions were written.

SANCTUARY

The support of guerrilla operations through the technique of sanctuary for the insurgents in an adjoining country is a familiar and accepted principle of special warfare operations. The opportunity for hard-pressed and exhausted guerrillas to retire within the confines of a friendly border for rest, regrouping, re-equipping, and resupply is an unfriendly and partisan act of a neighboring state. This poses once again the question of belligerency and the status of a state that assists covertly in the violation of a neighbor's borders and in subversive sabotage of its political institutions. The effectiveness of this type of support in special warfare was demonstrated in Greece in 1947 where the Communist guerrilla operations were highly successful until their right of sanctuary was lost with the sudden withdrawal of Yugoslavia from the international Soviet bloc.¹⁴ Shortly after this the entire guerrilla effort collapsed. This problem was encountered again, but not solved, during the Korean police operation when the Chinese

¹⁴D. M. Condit, Case Study in Guerrilla War: Greece During World War II, et passim.

"volunteers" and the North Koreans made convenient and good use of the line of the Yalu River in conducting their military operations against the United Nations. In more recent years, the principle of sanctuary has been successfully used in Africa and in Southeast Asia, particularly in respect to the sanctuary provided to the Viet Cong by North Vietnam, Laos, and Cambodia.¹⁵ Are these States to be regarded as participants in the war and subject thereby to the hazards of such a status? Are the citizens of those States who are actively and significantly contributing to the hostilities to be regarded as belligerents, co-belligerents, unprivileged belligerents, legal or illegal guerrillas, or merely innocent civilians who bear no responsibility for their acts? The applicability and usefulness of the Conventions in conflicts of this type is uncertain and confused.

PRISONERS OF WAR

Captives of Counterinsurgent Forces.

Counter guerrilla forces, as representatives of a recognized government and subject to the laws of war and the Geneva Conventions, are very much concerned with the legal or belligerency status of captured guerrillas and what their treatment should be in accordance with the Conventions. In general, the guerrilla in special warfare operations is not accorded the protection of the customary laws of

¹⁵US Dept of State, A Threat to the Peace: North Vietnam's Effort to Conquer South Vietnam, Part 1, pp. 32-42.

war and of the Geneva Conventions unless the conflict fulfills the requirements of belligerency and has been deemed an international action. Such recognition would mean granting captured insurgents bona fide prisoner-of-war status according to the Conventions and would result in important legal and political advantages for the insurgents.¹⁶ Since the insurgent is usually looked upon by the government under attack as an ordinary outlaw or bandit, the treatment meted out by these governments to guerrillas is based on local or national law and is usually quite severe. Article 4 of the 1949 prisoner-of-war Convention requires that irregulars, guerrillas, and members of resistance forces satisfy four requirements in order to qualify as legal belligerents and so merit prisoner-of-war status upon capture. Article 4 of the Convention states that the following shall be prisoners of war:

(2). Members of other militias and members of other volunteer Corps, including those of organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer Corps, including such organized resistance movements, fulfil the following conditions:

(a). That of being commanded by a person responsible for his subordinates;

(b). That of having a fixed distinctive sign recognizable at a distance;

(c). That of carrying arms openly;

¹⁶Thienel, op. cit., p. 42.

(d). That of conducting their operations in accordance with the laws and customs of war.

A careful analysis of this Article suggests that it may not apply at all to the guerrilla and to his status as a prisoner of war. It seems more to concern the partisan and the volunteer, including those from other nations, who have organized resistance movements to an invader or conqueror.¹⁷ At any rate, it is not clearly and directly expressed as relating to the guerrilla, and there is some reasonable doubt as to its application in this era of unconventional conflict.

A brief consideration of the requirements laid down by this Article indicates that their sufficiency and pertinency is open to serious question. If these provisions were complied with, the scope of legitimacy of guerrilla warfare would be so limited that its effectiveness as an instrument of power would be practically nil. The very factors upon which guerrilla warfare depends for its success are eliminated by these stipulations. For example, the important factors of surprise and concealment are eliminated. The ability of the guerrilla to disappear and merge into the population as a peaceful citizen only to reappear at a later and more propitious time is basic to his entire mode of operation and existence. The dichotomy of his operations--the lean, hungry, angry, and dedicated fighter by night and the lethargic, plodding, contented, and loyal peasant

¹⁷Robert Powers, "Guerrillas and the Laws of War," United States Naval Institute Proceedings, March 1963, p. 86.

farmer by day--is destroyed by acceptance of these requirements. Further than the open bearing of arms and the wearing of a distinctive badge or uniform by the guerrilla, the proposition that the insurgent have a viable government to be responsible to, that his leaders and commanders control his actions and be responsible for him, and that all of the customary laws of war be complied with by him is patently unrealistic and not in consonance with this new era in conflict. These requirements have been consistently ignored in guerrilla actions in the past and it seems improbable that there will be any change in special warfare tactics in the future which will make them any more feasible. In spite of these requirements it seems apparent that the intent and spirit of the Convention is to provide leniency, justice, and mercy for the captured guerrilla. This may be accomplished indirectly, not because of the Conventions, but because of a basic psychological problem posed by the insurgency. The objective of converting the guerrilla and his sympathizers into friends and supporters of the government is a fundamental one in the conduct of any counterinsurgency campaign.¹⁸ Because of this, kindness and consideration for the guerrilla is often dictated with the hope that, upon release and return to the people, a more favorable image of the government will be built up.

¹⁸W. H. Hessler, "Guerrilla Warfare is Different," United States Naval Institute Proceedings, April 1962, pp. 41-42.

Even though the insurgent does not qualify for prisoner-of-war status under Article 4 of the Convention, Article 3, one of the common articles to all of the Conventions, states that these individuals do have certain basic humanitarian rights and the insurgent is provided with all of the protection given by states to criminals in custody of the police plus some of the protection afforded prisoners of war in the sense of the Conventions. It should be noted, however, that Article 3 applies only to conflicts not of an international character and that it does not effect the legal status of parties to the conflict. It does not prohibit punishment of the captured insurgent. It is only unreasonably harsh and cruel punishment not in keeping with the offense and given without benefit of proper trial and judicial procedure that is prohibited. In the event that there is some question in the minds of the captors concerning the status of a prisoner, Article 5 of the Prisoner of War Convention provides that all persons who have committed belligerent acts shall be under the protection of the Conventions "until such time as their status is determined by a competent tribunal." In spite of the clear intent of this Article, the German, Russian, and Japanese Governments in World War II did not comply with this provision and wholesale executions of partisans and patriots, who were pre-emptorily and illegally declared as brigands and bandits, occurred.¹⁹ Fortunately, in the

¹⁹Murick and Barrett, "Legality of Guerrilla Forces Under the Laws of War," The American Journal of International Law, Vol. 40, July 1946, pp. 579-582.

case of the Germans and the Japanese, many of the perpetrators of these crimes were later tried as war criminals by properly constituted international tribunals and were punished for their inhumanity. Gross violations of the code of the Geneva Conventions was the principle charge under which these individuals were indicted and convicted.

Because of the frequent inability of the guerrilla to meet the requirements for recognition as legal belligerents under the Conventions and because of their obvious need for protection, the concept of the "unprivileged belligerent" has been developed and advanced by workers in the field.²⁰ An "unprivileged belligerent" according to this thesis is an individual who has been taken into custody for hostile acts against the enemy and who does not qualify for belligerency status under the Conventions. Such an individual, operating in occupied territory, falls within the purview of Article 5 of the Convention relative to the treatment of prisoners of war and is entitled to the status of a "protected person." These individuals are given limited guarantees of fair and humane treatment. On the other hand, such an individual operating in unoccupied territory is without protection under the Convention and his status and treatment are largely at the discretion of the enemy field commander.²¹ Since the guerrilla is protected to a greater degree if

²⁰US Army, Judge Advocate General's School, The Juridical Basis of the Distinction Between Lawful Combatants and Unprivileged Belligerents, Charlottesville, University of Virginia, 1959, at passim.

²¹Thienel, op. cit., p. 49.

captured in occupied territory than he would be if captured in unoccupied territory, although engaged in the same kind of activities, an illogical discrepancy is seen to exist in the Conventions. The "unprivileged belligerent" concept would allow all guerrillas, whether in occupied or unoccupied territory, not meeting the requirements for legitimate prisoner-of-war status to fall into a status which, while not providing all of the benefits due to legal prisoners of war, would give them broad humanitarian consideration under the protection of the Conventions.²²

Captives of the Insurgent Forces.

Soldiers engaged in counterinsurgency activities are entitled to the full protection of the 1949 Convention Relative to the Treatment of Prisoners of War. In fighting guerrillas, the use of counter guerrilla forces who employ special warfare tactics similar to those used by the irregular forces is often desirable and necessary. These soldiers, however, are members of regularly constituted armed forces and the use of guerrilla tactics does not negate their status as legal prisoners of war.²³ The precedent for this was made by the United States Army General Order No. 100, dated 24 April 1863, and which stated in part:

So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, and other warlike acts are not individual crimes or offenses.

²²Ibid., pp. 48-49.

²³Robert Powers, op. cit., p. 23.

Articles 3, 4, and 5 of the 1949 Prisoner of War Convention, which have been previously discussed, broaden and extend this concept. In theory, Article 3 binds the insurgents in their treatment of captives, even though they have never signed the accord, because they are a "party to the conflict." Since an insurgent group fights for political reasons within a state, the international obligations that apply to the state also apply to the insurgents--or so the legal reasoning goes.²⁴ Further than this, the international military tribunals which were convened following World War II have stated that the general humanitarian provisions of all international accords or Conventions exist independently of any contractual obligations and are incumbent upon the world community of peoples and nations in their implementation.²⁵

In a sense, much of the foregoing must be considered to be academic for the very nature of the guerrilla and his type of warfare limits significantly the problem of dealing with his captives. In the first place, the guerrilla, especially in China, Southeast Asia, and in Africa, is usually a downtrodden illiterate native who has never heard of the laws of war, the Geneva Conventions, or any other humanitarian device for alleviating some of the misery of war. Usually, the guerrilla has not had the advantage of Christianity in learning of the virtues of kindness and of mercy. Except for the

²⁴Pamphlet 27-100-21, op. cit., p. 117.

²⁵Thienel, op. cit., p. 46.

purposes of intelligence, reprisal, psychological gain, or ransom, he will take prisoners. The fact that guerrilla operations are generally conducted with a high degree of mobility, stealth, and surprise and that these operations are frequently in the midst of the enemy or in his rear simply precludes any serious question of retention of any significant numbers of prisoners. As a result, the enemy is usually killed outright rather than captured. Under unusual circumstances, a few captives may be taken for information purposes, tortured into revealing the necessary data, and then executed. On other occasions, for psychological reasons, the guerrilla may attempt to demoralize and influence the opposing forces to desert and switch their loyalties by returning prisoners who have been well treated, brainwashed, subjected to intense ideological and political indoctrination, and convinced of the ultimate righteousness and final victory of the guerrilla cause.²⁶ Finally, the insurgents, in trying to substantiate claims of legal belligerency as in Algeria and in Indochina, may treat prisoners in accordance with the Conventions or even better in order to establish compliancy with the requirements of belligerency or at least to leave that impression.²⁷

In spite of these exceptions, it seems safe to say that experience up to the present time indicates that the Geneva Conventions

²⁶Che Guevara, Guerrilla Warfare, p. 46.

²⁷Pamphlet 27-100-21, op. cit., p. 118.

have not been and probably will not be in the future a major factor in determining the manner in which the guerrilla treats his captives.

THE SICK AND WOUNDED

Article 13 of the 1949 Convention relative to the sick and wounded enumerates the following six distinct categories of personnel who will be protected and cared for by this Convention in all circumstances.

- (1). Members of the armed forces of a party to the conflict as well as members of volunteer corps of militias forming part of that force.
- (2). Members of other volunteer corps such as organized resistance movements who operate inside or outside their own territory provided they fill the following four conditions:
 - (a). Commanded by a person responsible for his subordinates' actions and conduct.
 - (b). Carry arms openly.
 - (c). Wear a fixed distinctive insignia recognizable at a distance.
 - (d). Conduct their operations in accordance with the rules and customs of war.
- (3). Members of regular armed forces who profess allegiance to a Government not recognized by the Detaining Power.
- (4). Persons not belonging to but accompanying the armed forces such as reporters, photographers, and technicians, provided they have proper authorization from the armed forces they accompany.
- (5). Members of crews of merchant marine and the crews of civil aircraft of the Parties to the conflict.

(6). Inhabitants of nonoccupied territory, who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

It is to be noted that these persons are substantially the same as those entitled to prisoner-of-war status under the Prisoner of War Convention. They are specifically listed in this Convention again because of the possibility that states might be parties to this Convention without necessarily being parties to the Prisoner of War Convention.²⁸ How useful this list might be to medical personnel is open to some question for traditionally medical facilities are open to all who need medical care, particularly of an emergency nature in wartime. Upon recovery and no longer needing medical attention, those listed above will revert to ordinary prisoner-of-war status under the third Convention.

In addition to Article 13, a significant provision regarding eligibility for medical care is found in Article 3 of all four Conventions. This Article provides that all sick and wounded, whether in the armed forces or not, even if they be guerrillas without bona fide belligerency status, must be collected and cared for by medical personnel. These individuals, however, not being listed in Article 13 and not having bona fide belligerency status, that is the typical guerrilla, upon recovery will revert to the status of "protected

²⁸Draper, op. cit., p. 74.

persons" under Article 5 of the Convention dealing with prisoners of war.²⁹ Thus, from the strictly medical standpoint, guerrillas, under the Conventions, are accorded the same treatment and care given legal prisoners of war. This is as it should be and is in accord with a code which is much more profound and ancient than that of the Conventions, the code of Hippocrates.

While it is true that the guerrillas can be and are taken care of medically by the counterinsurgent forces, it is not a two-way street as far as the sick and wounded counterinsurgent is concerned. Assuming that the guerrilla was motivated to provide medical care for the sick and wounded of the enemy, which he is not, there are no personnel or facilities⁴ at his disposal to provide for the collection and treatment of counterguerrillas or civilians who might fall into his custody as a result of wounds or sickness. For example, in Southeast Asia, Africa, and in parts of Latin America, where the unconventional conflicts are now occurring, the general level of medical capability and the availability of satisfactory facilities is of such low degree that adequate medical care of the foe, or friend, as for that matter, is virtually impossible. This poor availability of adequate medical care is consistent with the backward, nonprogressive, poor, and underdeveloped countries in which unconventional warfare is the most likely tool of exploitation.

²⁹Thienel, op. cit., p. 39.

It would seem that, in areas where guerrilla warfare is apt to develop in the next decade or so, these same conditions will likely prevail. In addition to this, the fact that guerrilla forces seldom have formally organized and effective medical services, at least by Western standards, makes even more depressing the plight of the captured and wounded counter guerrilla. There seems to be no escape from the conclusion that in the unconventional conflicts of today, the wounded and sick of the counter guerrilla forces who fall into the custody of the guerrilla forces, although entitled to full medical protection and treatment under the provisions of the Conventions, can expect little or no medical consideration. As in the case of the prisoners of war, the philosophy and techniques of guerrilla warfare precludes, except in isolated instances, compliance with the provisions of this Convention.

Article 24 of the Convention dealing with the sick and wounded is, perhaps, one of the most significant in terms of consideration of the application of this Convention to the current era of special warfare operations. For here is spelled out, in simple and concise terms, the limitations of the activities of medical personnel participating in these conflicts. Article 24 states, in part:

Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as Chaplains attached to the armed forces, shall be respected and protected in all circumstances.

The term "exclusively" in the above quotation is the key word for it specifically delegates to medical personnel the role of non-combatancy in their military activities. It simply means that the protection afforded to medical personnel by the Convention is contingent upon the fact that they will not act in any manner which could be hostile to the interest of the enemy.³⁰ In a sense this interpretation may be too restrictive and somewhat unrealistic. The known and accepted benefits of an effective and efficient medical service to troop health and combat morale and hence to their effectiveness against the enemy cannot be discounted. Thus, medical personnel do, although indirectly, contribute to the disadvantage of the enemy. At least, it is a sort of intangible thing and does not involve overt aggression and hostility which seems to be the basic intent of Article 24. In conventional warfare, this concept of noncombatancy for medical personnel has been very effective in maintaining and extending humanitarian ideals in the dirty business of war. Traditionally, the medical service has strongly advocated and practiced complete and unquestioned compliance with the Conventions for, not only are they a part of the law of the land and of ancient Hippocratic traditions, but also in conventional warfare the obvious benefits of such regulations are readily apparent and compliance by all Parties to the conflict is easily determined. As has been pointed out in

³⁰ Greenspan, op. cit., p. 57.

detail previously, the conditions of special warfare operations are unique and different when considered against the background of conventional warfare and thus the benefits obtained and compliance by all Parties to the conflict with the provisions of the Conventions is difficult if not impossible to ascertain. It should be noted that, even in special warfare operations, medical personnel who engage in activities hostile to the enemy lose the protection of their status. Furthermore, if they engage in such acts under cover of the duties that afforded them protection, they are guilty of war crimes and are subject to the subsequent penalties thereof.³¹

The concept of medical personnel engaging exclusively and solely in medical activities in special warfare situations is difficult of implementation and from the point of view of combat effectiveness is not too feasible. In guerrilla activities, for example, where the size of the force is small and operations are conducted in a clandestine manner by infiltration and concealment in enemy occupied territory, it is essential that every component of the force be an aggressive soldier ready at every moment to kill, destroy, or otherwise injure the enemy. Toward this end, all members of the team must be thoroughly cross trained in many areas in order to insure success. The necessity for these units to frequently operate for long periods of time detached from supply lines and personnel replacements depots further justifies

³¹ Ibid.

the need for extensive cross training. Can these units afford the luxury of medical personnel trained in and engaged in medical activities exclusively? Will strict compliance with the Conventions put these units at such an operational disadvantage that the success of the mission could be prejudiced? Thoughtful reflection on the nature and intent of guerrilla activities would seem to indicate that the answer to the first question must be in the negative while to the second in the affirmative. Accounts of guerrilla actions in the past twenty years seem to indicate that this has been their answer, too.

In counterinsurgency operations, the requirements on personnel may not be quite so rigid and exacting as they are in the case of the guerrilla, for the counterinsurgent usually has more freedom to re-supply and to bring in additional personnel replacements. It is recognized, however, that often the most successful counterinsurgency methods are those which employ guerrilla tactics and techniques and so the counterinsurgent does, to some extent, have some of the problems of the insurgent.³²

One form of counterinsurgency, for example, may employ the good offices of the medical elements to help in winning over the sympathy of the people and to supply information regarding the insurgents and their operations, which has been gathered in the

³² US Dept of the Army, Field Manual 31-15, Operations Against Irregular Forces, pp. 25-30.

course of performing routine medical activities. These and similar techniques are practices which bring medical personnel into direct actions which are unfavorable and hostile to the enemy forces. Again, must the counterinsurgent be placed at a tactical disadvantage because his techniques of warfare do not comply with the Conventions, when it is known that the enemy is not complying in the spirit or in the letter with its provision? A reflective and pragmatic answer must be in the negative.

Articles 40 and 41 of this Convention deal with the identification of medical personnel, and it is stipulated that such personnel while on duty status will wear affixed to the left arm a water resistant armband bearing the distinctive insignia of the Red Cross. This provision was infrequently complied with by medical personnel during World War II and during the Korean War. The lack of realism in applying this regulation to insurgency and to counterinsurgency operations is apparent from the foregoing discussions and as far as the guerrilla is concerned, it suggests the principle of reductio ad absurdum.

Articles 36, 39, and 42 of the Convention deal with the identification of medical transport, equipment, and establishments and provides for, consistent with the desires of the military commander, the use of the distinctive Geneva Red Cross in identifying these items. Experience in conventional war has shown that this is frequently not desirable for the marking of medical units of equipment may serve the enemy as a means of identifying

and pin-pointing other combat units which may be in the vicinity. Patently, such a system of identification in special warfare operations is out of the question.

Articles 8, 9, and 10 of the Convention deal with the duties and responsibilities of the Protecting Power, the International Red Cross, and other humanitarian organizations in acting as representatives and inspectors to the conflict in the interest of the participants. The incongruity of these Articles in most special warfare operations, where the status of the conflict and the true identity of the Parties to the conflict is frequently in doubt, seems obvious and will not be commented upon further.

Finally, there are Articles 16 and 17, which deal with the keeping of medical records, notification of hospitalization, and the handling of the dead (a Quartermaster function in the United States Army). Although these Articles are quite significant in terms of conventional warfare, they are, in the present context of special warfare operations, not pertinent in that compliance is clearly out of the question.

In general, it may be said that the Conventions of 1949, regarding medical policy and care, which are apropos and effective in conventional warfare, simply are not appropriate or realistic in terms of special warfare operations. The provisions dealing with the noncombatancy and protection of medical personnel, the return of medical personnel upon capture back to friendly lines, the marking and identification of medical personnel, equipment,

transport, and installations, medical records, handling of the dead, and the use of impartial humanitarian organizations in the care of the sick and the wounded--all--and these provisions constitute by far the greatest part of the Convention--were not designed or intended for use in the unconventional power struggles of the uncertain world of today.

It would seem that the basic nature and techniques of special warfare operations would make the formulation of an effective international document which could be accepted by all of the nations of the world very difficult, if not impossible, especially when the Southeast Asian, Chinese, African, and Latin American arenas of conflict are considered. A careful and detailed study of the medical role in each special warfare operation since World War II might be of great benefit in pointing out specific areas in which this Convention could be altered to make it more effective.

VIETNAM

In September 1961, in an address to the United Nations, the late President Kennedy warned that body and the peoples of the world of the dangers of "the smoldering coals of war in Southeast Asia." Nowhere today do these coals glow more ominously than in South Vietnam. Here the Communists have brought out their entire bag of tricks ranging from the selective assassination of a village chief today to the sweet talk of peaceful coexistence

and the brotherhood of man tomorrow.³³ The basic pattern of the Communist aggression is not new, for these same tactics have operated successfully in Cuba, Algeria, Laos, Burma, China, and IndoChina. As is typical, the Communists have made determined efforts to conceal and minimize their international role in the aggression in Southeast Asia, even to the point of publically repudiating their subversive activities and interest in the area in the forum of the United Nations.

The Geneva Accords that ended the IndoChina War in 1954 set the classic and inviting stage that the Communist strive for in initiating their activities of conquest. The Republic of Vietnam, emerging as a new nation in 1955, after years of foreign occupation, strife, and destruction, was in a shambles politically, economically, and socially. In spite of these ominous signs, between 1955 and 1958 the country went to work and, with the help of many friendly nations, improved the economy to the point where it was overtaking their neighbors to the north. This tremendous economic improvement coupled with the fact that the ambitions of the North Vietnamese in taking over the country peaceably by means of the ballot had been thwarted, led the Communist in 1958 to make the decision for more extensive use of subversive violence in the form of the Viet Cong.³⁴

³³ US Air Force, Anthology of Related Topics on Counterinsurgency, Vol. 2, 1963, Lackland Air Force Base, "The Bloody Hands of the Viet Cong" pp. 218-226.

³⁴ US Dept of State, A Threat to the Peace. North Vietnam's Effort to Conquer South Vietnam, pp. 5-7.

Although there has never been any declaration of hostilities or formal statement of rebellion or insurgency, the Viet Cong have been quite objective and deliberate in their planning and actions for the overthrow and conquest of the legally constituted government. In spite of the fact that there has been and is a war involving severe loss of life and widespread destruction of property on both sides as a result of the Communist military attempt to overthrow the lawfully constituted government and to establish an international Marxist regime in its stead, the Geneva Conventions or any other humanitarian organizations have not been called into play and, as far as the Conventions and humanitarian principles are concerned, no conflict exists.

In this conquest, the Viet Cong have utilized three types of soldiers. One is the peasant in the village who receives no pay and carries on his usual occupation--farmer, fisherman, or laborer--during the day. At night, however, it is an entirely different story and he works industriously at the business of insurgency at the village level with five to ten of his compatriots in carrying out the orders of the district or higher Communist headquarters. A second group of soldiers are the half-time irregular forces which have been organized by the Viet Cong at the district level. This type works about half of his time for the Communist forces, for which he receives a small pittance. His remaining time is devoted to work in the village or in the surrounding area in eking out his meager existence. The third

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type of soldier and the hard core of the Viet Cong is the full time regular guerrilla who operates on a regional or province basis.³⁵ He is well trained, highly motivated, knows his job, and usually gets it done. In general, these soldiers are illiterate, mal-nourished, diseased, non-Christian, and poverty stricken people who have little to lose now and whose faith and hope in the future provides small incentive. They are frequently led by fanatical Communists who have no respect for life or property in the Western sense and who have taught hate and vengeance against their brothers in South Vietnam and particularly against the Americans who help and advise them.

It is, therefore, interesting to speculate on the type of international humanitarian document, if indeed there is any at all, that could possibly cover the varied types of soldiers, actions, and conditions that prevail in South Vietnam today. Most certainly the Geneva Conventions or any of the other international humanitarian agencies, as now constituted, would not be able to cope with the situation in Vietnam today.

One interesting facet in this struggle has been the implementation of the "strategic hamlet" program as a means of controlling the Viet Cong. This program, in the hands of the British in Malaya, had previously proven to be of value in controlling the actions of the guerrillas by eliminating their

³⁵Ibid., pp. 7-8.

prime source of support--the people--from their reach.³⁶ This was done by putting the people from the rural areas, which were infested by the rebels, into a number of well-guarded and protected villages--the strategic hamlets--and controlling all egress and ingress very closely.³⁷ In general, the people cooperated very well, for they were given much more security and freedom from fear than they had been accustomed to and in addition they usually received suitable compensation for their belongings and for their homes and lands. Many, however, did not want to move and it became necessary for the government to force them to leave their homes and lands and move into the controlled villages.³⁸ The program initially seemed to be working very well and the effectiveness of the Viet Cong was noticeably diminished. However, it has now seemed to have lost some of its effectiveness and at the present time there is some question as to just how effective it really is.

This sort of action brings up some interesting questions with respect to the fourth Convention concerning the protection of civilians in time of war. One might ask about those people who were forced to move against their will; those who were deprived

³⁶Muros, Ralph L., "Communist Terrorism in Malaya," United States Naval Institute Proceedings, Oct 1961, at passim.

³⁷US Dept of the Army, MAAG, Vietnam, "Missions of Strategic Hamlet Cadres," Saigon, 3 Oct 1962.

³⁸Col Carl Shadd, Chief Strategic Hamlet Program, MAAG, 1961-63, personal interview, 8 Jan 1964.

of their freedom of movement; those who were burdened with extra work; those who were inadequately compensated or received no compensation at all; and those who were forced to bear arms in defense of the village. These actions might well be justified by the "military necessity" clause as set forth originally in Article 23 of the Hague Regulations of 1907 and later in Article 53 of Geneva Convention 4. However, it must be remembered that the "military necessity" clause did not hold up during the Nurnberg trials and the International Military Tribunal did not accept it as a valid argument in mitigation of guilt of those charged with war crimes.³⁹ Because there seems to be two sides to this question, it would be beneficial if it could be dealt with directly in some future international forum or Convention.

The interesting and baffling international problem of sanctuary and of volunteers is one of prime importance in Vietnam. There seems to be ample evidence to substantiate the thought that North Vietnam, Laos, and Cambodia are all serving as sources of re-supply and as safe havens from which the Viet Cong can and do operate.⁴⁰ Further, the activities of volunteers from Laos, Cambodia, North Vietnam, and China have been noted and have been verified. However, these actions are extremely difficult to prove beyond a doubt, especially to the Communists and their friends. Even if these conditions could be proven to the

³⁹ Morris Graanspan, op cit., pp. 279-280.

⁴⁰ US Dept of State, "A Threat to the Pacific," op. cit., pp. 38-42.

satisfaction of the world, the Conventions have no definitive provisions dealing with these specific facets. There is no need in the Conventions for clarification on these points.

Many of the tactics used by both sides in this conflict could not be condoned under any circumstances by the Conventions or any other humanitarian agency, although the bulk of the evidence suggests that the principal offenders against the ideals of the Conventions have been the Viet Cong terror, torture, kidnapping, and selective assassination are the favored methods of force and coercion used by the Viet Cong in carrying out their program of destroying order and security in South Vietnam. In 1960, for example, over 1400 local government officials were assassinated by the Viet Cong and over 700 were kidnapped and held as hostages for ransom.⁴¹ The more civilized aspects of the war, such as the protection of prisoners and the care of the sick and wounded, simply do not seem to exist. It is difficult to conceive of the Geneva Conventions as now constituted being able to exert any ameliorating influence in behalf of the victims of this aggression in South Vietnam.

The position of American troops in South Vietnam with respect to the international laws of war and to the Geneva Conventions is one of complete legality.⁴² Their status as

⁴¹Ibid., pp. 12-13.

⁴²Pamphlet 27-100-21, op. cit., Mutual Defense Assistance Agreement--Vietnam, Dec 23, 1950, p. 115.

noncombatants is known and accepted by most of the nations of the civilized world and yet, in spite of this noncombatancy status, something over 400 of them have been killed to date from all causes, many from combat actions. There is well substantiated evidence of atrocities committed against the Americans by the Viet Cong.⁴³ Degrading and humiliating procedures, such as leading bound and shackled Americans through the village streets, have been reported by eye witnesses. There has been definite and substantiated evidence of cold blooded murder of American prisoners by the Viet Cong. The people who commit these crimes have probably never heard of the international laws of war or of the Geneva Conventions.⁴⁴ However, judging from their background and from their actions in this conflict, it probably would have made no difference if they had known of these humanitarian documents.

In short, the experience gained in this war to date would seem to indicate that the Geneva Conventions are not an adequate instrument of international humanitarian policy for the amelioration of the condition of the victims of wars of this type.

Any effective international document for the alleviation of the horrors of war in this type of conflict must, first of all, be accepted and honored by a majority of the nations of the world; second, there must be some means of being officially called

⁴³Col Carl Shadd, Chief Strategic Hamlet Program, MAAG, 1961-1963, personal interview, 8 Jan 1964.

⁴⁴Ibid.

into play or implemented, perhaps through the United Nations or some other humanitarian agency; third, following implementation there must be specific provisions which deal with the problems engendered by this type of warfare. Problems such as the treatment of prisoners of war, the care of the sick and wounded, terror, assassination, kidnapping, torture, protection of civilians, strategic hamlet concept, reprisals, volunteers, sanctuary, propaganda, nuclear and CBR warfare, and civic actions--to mention a few; fourth, there must be an effective means of transmission of the true meaning and significance of the document to all Parties to the conflict down to the lowest levels; fifth, and last, there must be some effective way of detecting violations --a means of inspection if you will--and of punishing, through international actions, Parties who have not complied with the provisions of the code.

THE UNITED NATIONS

The Geneva Conventions have developed in the context of war being a contention between two or more states through their armed forces. A war which involved more than two states or a coalition of states has been regarded as creating only bilateral relationships between the individual states. The development of unified international military forces, integrated to some degree in both command and political structure, such as the United Nations forces, has resulted in a problem with which the

Conventions were not designed to cope.⁴⁵ The framers of the Conventions did not envisage this modern organization of international military commands and made no provision for their activities within the scope of the Conventions. In a similar manner, the United Nations, although well aware of the Geneva Conventions, made no provision for relating these forces to the Conventions or for determining the legal responsibilities of the troops and commanders acting in its name.

This raises the interesting question of the status of the United Nations troops and of their captives with respect to the Conventions. Are members of the United Nations commands legally entitled to the protection of the Conventions? On the other side of the coin, what are the rights of the captives of the United Nations commands? Who is the responsible or Detaining Power? The entire area involving the relationship of integrated international military forces and the Geneva Conventions is one of confusion and misunderstanding.

In Korea, for example, the situation with respect to the Conventions was quite confusing inasmuch as the hostilities, on the one side, were conducted by South Koreans and a unified international command of the United Nations and, on the other, by North Korean Communists with the support of "volunteers" from

⁴⁵ William H. Conley, The Legal Status of Prisoners of War Captured by a United Nations Force, Thesis, Carlisle Barracks, US Army War College, Jan 1960, pp. 1-6.

China. It is interesting that the United Nations troops carried out their military duties without direction or guidance from that body. The opinion has been expressed that the United Nations command as such was not legally bound by the provisions of the Conventions; thus, it was fortunate that the nations of this command felt themselves subject to the moral and humanitarian principles of the Conventions and as individual nations the Conventions were complied with to the letter.⁴⁶ Compliance with the provisions of the Conventions by the opposing side was poor and many atrocities and inhumanities were committed in the guise of military necessity and expediency.

In recent years, the United Nations has taken active part in maintaining world peace and in so doing has committed military forces in its name to engage in armed conflict with other nations when it was deemed in the best interest of world peace. A majority of these military actions were unorthodox in nature and the techniques of special warfare operations were frequently employed by the opposing side. It seems likely that the United Nations will continue in this role of maintaining the peace for some time and thus, it is essential that the United Nations forces have a clear and unquestioned legal right to engage in these operations beneath the umbrella of the Geneva Conventions.

As of this date, neither the United Nations nor the signatory parties to the Conventions have taken any action to

make the provisions of the Conventions applicable to such unified international military commands.

⁴⁶Ibid. p. 35.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

1. It seems apparent from this study that the Geneva Conventions have not been concerned or related, in general, with special warfare operations in the civil, colonial, or the so-called "people's" wars of the past two decades. This is not a desirable or healthy situation from the standpoint of humanity and world peace because experience in recent years has demonstrated that these wars may be of a most vicious, cruel, and inhumane nature and may contain the seeds of international conflict which could threaten the peace and security of humanity over the entire world. This is particularly true in the unconventional wars of recent years where the opposing sides represent differing political ideologies which are frequently supported with great fanaticism by the local combatants and, in many instances, by the great powers which are sympathetic to their particular viewpoints. Since these unconventional wars are being waged on many fronts today and since all indications suggest that they probably portend the wave of the future in controversies of local, regional, and even international character, humanitarian and military necessity demands an effective international code to insure the protection of victims of war under these unorthodox and current forms of

conflict. This is not to suggest that such a code would result in the prevention of killing and the inhumane treatment of prisoners of war, noncombatants, and civilians or the destruction of churches, medical supplies, and medical installations. There is no certain solution for this problem and, indeed, there are many reasons for anxiety in this regard in view of the ever widening gulf between the technological and the moral and social progress of our civilization.

2. The rapid changes in the past two decades in the political, social, economic, technological, and moral philosophy of the peoples of the world has resulted in the development of new concepts in weaponry, including military, economic, and psychological, and in unorthodox types of conflict which, while not effecting the basic objectives of the Geneva Conventions, have rendered many of its provisions ineffective, antiquated, and obsolete. Article 3, for example, which is common to all four of the Conventions, contains the only provisions in the entire document which apply directly to combatants who have not been recognized as possessing legal belligerent status and thus are subject to the rules and regulations of the Conventions. As an international code for the regulation of humanitarian activities in special warfare operations, this Article is very sketchy and sets forth only a bare minimum of humanitarian requirements.

3. This study suggests that the Geneva Conventions are inadequate in dealing with special warfare operations of the current era in the following respects:

- a. Recognition of the status of belligerency or lawful combatancy.
- b. Handling of prisoners of war.
- c. Care of the sick and wounded.
- d. Protection of the civilian population.
- e. Regulations concerning the problems of sanctuary, volunteers, and hostages.
- f. Regulations concerning proper procedures for the implementation of the Conventions.
- g. Regulations providing for effective methods of enforcement of the Conventions.
- h. Regulations dealing with the relationship of the Conventions to unified international military forces, such as United Nations forces, which may be engaged in overt military actions.

4. In general, military medical doctrines as presently dictated by the provisions of the Geneva Conventions in regard to the activities of medical personnel, medical identification and marking procedures, medical records and reports, and handling of the dead, etc., are inadequate and unrealistic in the context of special warfare operations. In particular, the tactics and techniques of present day special warfare operations would seem to

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preclude the luxury of medical personnel employed exclusively in activities which are not in any way hostile to the enemy.

5. Studies of ways and means to provide new and appropriate changes in many of the provisions of the Conventions are dictated if this document is to remain a viable instrument of the humanitarian conscience of a world in conflict.

RECOMMENDATIONS

1. That the Department of Defense establish a committee of appropriate composition¹ to consider and to make specific recommendations for changes in the Geneva Conventions that would make it a more effective instrument of international humanitarian policy in the context of special warfare operations in the current era.

2. That the Department of State, probably through the International Red Cross, begin the preliminary negotiations for the convening of a world conference of nations for the purpose of considering and accepting changes in the code of the Geneva Conventions, which will make it a more effective instrument of humanity and peace.

¹As a minimum, this committee should have representatives from the Medical Department, the Judge Advocate General's Department, the Office of the Provost Marshall, and the Combat Arms of the Army, Navy, and Air Force, plus selected representatives from the Department of State.

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Colonel, Medical Corps

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(An anthology of topical writings to describe, evaluate, and give proper perspective to the military effectiveness of guerrilla warfare.)

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(The first codification of the laws of war for use by the Armed Service of any nation. An important first step in defining the humanitarian considerations of war which exerted a strong influence on the drafters of the first Geneva Conventions in 1864.)

ANNEX ONE

GLOSSARY¹

In order to provide a common understanding of some of the terminology of the various Special Warfare activities and of some of the Geneva Convention usages, the following commonly accepted definitions are presented:

1. Special Warfare is a term used to embrace all of the military and paramilitary measures and activities related to unconventional warfare, counterinsurgency, and psychological warfare. The following outline illustrates graphically its various components:

Special Warfare

1. Counterinsurgency.
 - a. Counterguerrilla Operations.
 - b. Civic Actions.
2. Unconventional Warfare.
 - a. Guerrilla Warfare.
 - b. Evasion and Escape.
 - c. Resistance.
3. Psychological Warfare.

¹ Source: US Army Special Warfare School. United States Army Special Warfare, Fort Bragg, 1962, . B and Greenspan, Morris. The Modern Law of Land Warfare, Berkeley, University of California Press, 1959.

2. Counterinsurgency includes all military, political, economic, psychological, and sociological activities directed toward preventing and suppressing resistance groups whose actions range in degree of violence and scope from subversive political activity to violent actions by large guerrilla elements to overthrow a duly established government.

3. Counter guerrilla Operations are those active and passive measures taken by the armed forces and nonmilitary agencies of an established government and its allies against guerrilla forces.

4. Civic Action is any action by military forces of a country, utilizing military manpower and skills in cooperation with civic agencies, authorities, or groups that is designed to improve the economic or social conditions of the country.

5. Unconventional Warfare includes the interrelated fields of guerrilla warfare, evasion and escape, and resistance. Such operations are conducted in enemy held or controlled territory and are planned and executed to take advantage of or stimulate resistance movements or insurgency against hostile governments or forces.

6. Guerrilla Warfare is the conduct of combat operations inside a country in enemy or enemy held territory on a military or paramilitary basis by units organized from predominately indigenous personnel.

7. Evasion and Escape is one of those operations whereby friendly military personnel and other selected individuals are enabled to emerge from enemy held or unfriendly areas under friendly control.

8. Resistance is an organized effort by some portion of the civil population of a country to resist the legally established government or an occupying power.

9. Psychological Warfare includes those activities and operations planned and conducted to influence the opinion, emotions, attitudes, and behavior of the enemy, the indigenous population, and neutral or friendly foreign groups in such a way as to support the accomplishment of national aims and objectives.

10. Cold War is the use of political, economic, technological, sociological, and military measures short of overt armed conflict involving regular military forces to achieve national objectives

11. Wars of National Liberation, Just Wars, or Peoples Wars are propaganda terms used by the Communists to dignify their efforts toward covert aggression. These wars are waged only by the Communists or by peoples to whom they are giving their support.

12. Protecting Power is a state instructed by another state (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third state (known as the State of Residence).

13. Grave Breaches are those acts involving any of the following, if committed against persons or property protected by the Convention: wilfull killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.